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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT.

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LIMITATION OF THE AMOUNT OF THE COMMON CARRIER'S LIABILITY.—HEPBURN ACT.—When the case of *Railroad v. Lockwood*, 17 Wall. (U. S.) 357, settled the law that the common carrier can not contract against liability for losses due to his negligence, it did not put an end to the efforts of common carriers to escape liability for losses so arising. See 8 MICH. L. REV. 531. Various stipulations were printed in bills of lading, among them one providing that in case of loss the money recoverable should not exceed a specific sum. In many early cases this was decided to be but a new way of escaping the common law liability of the carrier for his negligence, by getting out of one half, or one-third, or some other fraction, of the liability which the courts had said could not be escaped at all. Thus in *Moulton v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 31 Minn. 85, 47 Am. Rep. 781, an agreement that, in case of total loss, the damage should in no case exceed \$100.00 per head for horses, the court held to be contrary to public policy as relieving the carrier of liability for his own negligence. Horses worth \$200.00 each having been shipped under such a contract and lost through the negligence of the carrier, full recovery was allowed. The United States Supreme Court, however, in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, held that an agreed valuation for the purpose of shipment of not more than \$200.00 each

on horses was valid, because it appeared that this valuation had furnished the basis for the carrying charges. It was not only no exemption from liability for negligence, but on the other hand to hold the carrier liable in a greater sum would be fraud, and repugnant to the soundest principles of fair dealing and of the principle of freedom of contract.

It is more than a quarter of a century since that decision, but there is not yet any sign of diminution in the volume of cases in which shippers continue to contend against conditions resulting from that rule of law. The question is a troublesome one. Fraud is often attempted upon the carrier. If Persian shawls and rugs and a diamond ring are shipped under a contract describing the goods as a second-hand desk, and providing against no extraordinary liability, unless a special agreement is made and the value is endorsed thereon, then certainly it is entirely equitable to limit recovery to the value of a second-hand desk. *Hachadoorian v. Louisville & Nashville R. Co.*, 128 App. Div. 171, 112 N. Y. Supp. 660. And if a shipper himself fills in a shipping receipt limiting recovery to fifty dollars unless the value is stated, and if the carrier has no knowledge of the real value of the goods shipped, then it seems reasonable to deny a higher recovery where a shipper did not fill in the blank as to value. *High Co. v. Adams Express Co.*, (Ga. App.), 63 S. E. 1125. See also *Douglass Co. v. Minnesota Transfer Co.* (Minn.), 30 L. R. A. 860. But a limitation of recovery to \$50.00 where the carrying charges were \$98.10 is pretty clearly not based upon any understanding that \$50.00 represents the real value. And the same thing is true in a case like *Murphy v. Wells Fargo & Co.*, 99 Minn. 230, 108 N. W. 1070, in which strawberries worth \$2,000.00 were shipped at a charge of \$330.00 and the carrier unsuccessfully attempted to limit the value for purposes of shipment to \$50.00. See however, *Baum v. Long Island R. Co.*, 108 N. Y. Supp. 1113, in which the goods were worth \$1,192.88, but recovery was limited to \$50.00, and *Donlon v. Southern Pacific Co.*, 151 Cal. 603, 91 Pac. 603, 11 L. R. A. (N. S.) 811, in which the owner of valuable horses which had been shipped over defendant railroad was limited to the recovery of the stipulated \$20.00 for each horse.

Some cases have gone very far to uphold all such stipulations. *Baum v. Long Island R. Co.*, supra, *Donlon v. Southern Pacific Co.* supra. Some have denied the operation of the rule almost *in toto*. *Baltimore & Ohio R. Co. v. Oriental Oil Co.* (Tex. Civ. App.), 111 S. W. 979; *Southern Express Co. v. Owens* (Ala.), 41 South. 752. The widely divergent rules are fully discussed in the recent case of *Hansen v. Great Northern Ry. Co.* (N. D.), 121 N. W. 78, which adopts a middle course, holding that a value in a bill of lading, which is set without inquiry or investigation as to the true value of the property, is arbitrary, is not reasonable and just, and is therefore invalid. It would seem from the general principles accepted by the courts that the test as to the validity of provisions of this sort should be their reasonableness. An actual *bona fide* valuation should be binding, but one that is arbitrarily fixed or one that was evidently intended to excuse the carrier from his real liability on the condition that he would charge the shipper a less rate, should not. If he and a shipper may agree that the liability may be less than the real value, there would seem to be no reason why they may

not by their private agreement make it as much less as they please, or even excuse the carrier altogether. This it is well settled, can not be done by a contract assented to by an individual shipper. On the other hand, if the shipper attempts a fraud upon the carrier, or refuses to respond upon the carrier's request for information, it is certainly just to fix limits on the carrier's liability. *Central of Georgia Ry. Co. v. Butler Marble Co.* (Ga. App.), 68 S. E. 775. Compare *Alair v. Northern Pacific R. Co.*, 53 Minn. 160, 19 L. R. A. 764, with *Moulton v. St. Paul, Minneapolis & Manitoba R. Co.*, 31 Minn. 85, 47 Am. Rep. 781, in which the Minnesota court harmonizes its decisions upon this basis. In the Georgia case a general limitation as to value of twenty cents per cubic foot for monumental marble was held to be clearly nothing more than an arbitrary adjustment for the measure of damages in case of loss, which could not exempt the carrier from liability for the true value of a shipment lost by his negligence. If there were an issue of fact as to whether the value fixed was a *bona fide* valuation the question would be one for the jury, but here the carrier knew what the goods were and the value fixed was manifestly inadequate. See also *Southern Express Co. v. Hanaw* (Ga.), 67 S. E. 944, in which the Supreme Court of Georgia refused to give effect to the New York rule on a shipment from New York, because the express receipt limiting liability to \$50.00 unless a definite value was given, while it would be binding in New York, was contrary to public policy in Georgia unless it appeared that \$50.00 was a *bona fide* valuation. In *Powers Mercantile Co. v. Wells Fargo & Co.*, 93 Minn. 143, 100 N. W. 753, the same limitation in an express receipt was held not binding on a consignment known by the Express Co. to contain silk shirtwaists. The same court in *Ostroot v. Northern Pacific Ry. Co.* (Minn.), 127 N. W. 177, held a shipper not bound by a stipulation limiting recovery for household goods to five dollars per hundred-weight. "It should require no argument to show that a valuation of five dollars per hundred-weight, when applied to pianos, cooking utensils and household goods, is intended as a mere arbitrary limitation of liability." But the same court in *Porteous v. Adams Express Co.*, (Minn.) 127 N. W. 429, refused to allow a recovery of more than \$50.00 on a shipment of a paste-board box, although the box contained jewelry to the value of \$1,435.00. It appeared that the carrier had no knowledge of the contents of the box. The Utah court seems to make the same distinction, refusing to recognize a limitation where the facts show that it is unreasonable, but enforcing it in a case when goods worth \$40.00 per hundred-weight were shipped as household goods at a limit of \$5.00 per hundred-weight, the goods being described as "A roll of carpet including one feather bed." These goods might, for all the carrier knew, be worth no more than \$5.00 per hundred-weight. *Larsen v. Oregon Shortline R. Co.*, (Utah) 110 Pac. 983.

But several recent decisions have upheld these limitations without regard to the distinctions in the last mentioned cases. The Michigan court, in *D'Arcy v. Adams Express Co.*, (Mich.) 127 N. W. 261, upheld an express receipt limiting to \$50.00 the value recoverable, though the goods shipped were opals worth \$372.00, and the carrier had notice and knowledge that the package contained valuable opals. *Bernard v. Adams Express Co.*, (Mass.)

91 N. E. 325, was a case in which the Massachusetts court without making distinctions, upheld a similar contract, and cited with approval the recent New York case of *Greenwald v. Weir*, 130 App. Div. 696, 115 N. Y. Supp. 311. This very late case has been several times cited by other courts, see *Travis v. Wells Fargo & Co.*, (N. J.), 74 Atl. 444; *Larsen v. Oregon Shortline R. Co.*, (Utah), 110 Pac. 983, and it has now been approved by the court of last resort in New York, *Greenwald v. Barrett*, (N. Y.), 92 N. E. 218. See also *In re Released Rates*, 13 Int. State Com. Com. R. 550.

The Hepburn Act, passed June 29, 1906, c. 3591, 34 Stat. 594, (U. S. Comp. St. Supp. 1909, p. 1166), has been held by some courts to put an end to contract limitations as to value. *Greenwald v. Weir*, 111 N. Y. Supp. 235, (overruled in 115 N. Y. Supp. 311), *Vigouroux v. Platte*, 115 N. Y. Supp. 880, 62 Misc. 364. The act provides, p. 550, "that any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be transferred, or over whose line or lines such property may pass, and no contract, receipt rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action which he has under existing law."

The result of the opinions rendered thus far indicates that the statute will make no change in the effect of such contracts, except that it will fasten upon the carrier liability for the defaults of connecting carriers as well as for its own negligence. It has yet to be passed upon by the Supreme Court of the United States. The various states are likely to hold to their former positions. See *Larsen v. Oregon Shortline R. Co.* (Utah), 110 Pac. 983; *Southern Express Co. v. Hanaw*, (Ga.) 67 S. E. 944; *Greenwald v. Barrett*, (N. Y.) 92 N. E. 218; *Travis v. Wells, Fargo & Co.* (N. J.) 74 Atl. 444; *Bernard v. Adams Express Co.* (Mass.) 91 N. E. 325.

An interesting turn is taken in *Schlosser v. Great Northern Ry. Co.* (N. D.) 127 N. W. 502. It is there held that if one person is bound to ship goods to another the carrier becomes the agent of the consignor. If by the negligence of the carrier the goods are lost, then the consignee may sue either the consignor or the carrier, not on the contract of shipment, but on the liability of both principal and agent, or of either alone, for the torts of the agent. If this is good law, why may not a shipping public devise a contract whereby a consignor employs the carrier as his agent, so that the consignee may recover in tort against the carrier for any loss due to the negligence of the latter, and that he shall not be bound by the contract between the consignor and the carrier? The end of this struggle between the carrier and the people is not yet. It may be that further statutes are to be required to secure quiet on this troubled water. In this connection the language used by the Interstate Commerce Commission in *Matter of Released Rates*, 13 Int. State Com. Com. R. 565, is very suggestive. "But we should not hesitate

to express our disapproval of tariff rules that are ambiguous and misleading, and to a certain extent incapable of enforcement. Rule 4 of the Western Classification, quoted above, would be unobjectionable if it went no further than to absolve the carrier from liability for loss due to causes beyond its control. The carrier could not, however, escape responsibility for losses due to many of the causes catalogued therein if its negligence were the legal cause of the damage. The carrier must know, too, that the courts will not give full effect to stipulations that there shall be no liability for losses 'from any cause to property carried on open cars.' Again, the stipulation that 'shipments not made as above provided are subject to an additional charge of 20 per cent' is unreasonable. A certain differential between rates which leave the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carrier assumes when the liability is unlimited. An increased charge of 20 per cent is manifestly out of all proportion to the larger risk involved, and its virtual effect is to restrict the public to rates calling for limited liability. Herein lies the vice in stipulations of this character. It is a mischievous practice for carriers to publish in their tariffs and on their bills of lading rules and regulations which are misleading, unreasonable, or incapable of literal enforcement in a court of law. A revision in the interest of simplicity and fairness, eliminating such provisions as may be open to legal objection, would go a long way toward improving the relation of the railroads and the shipping public."

E. C. G.

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**SURETY'S RIGHT TO EXONERATION.**—If a surety pays the debt to the creditor he is entitled to all the rights which the creditor had the moment before payment. This right to the assignment of the claim against the principal and co-sureties and to the assignment of all the collateral securities for the payment of the debt is purely equitable; it is given to the surety because the creditor, having been paid can no longer enforce the securities and the debtor, not having paid can not have them surrendered up and cancelled. The rights which the surety gets by the assignment may, of course, be either legal or equitable and generally speaking he may bring whatever suit the creditor might have brought. This right of substitution, or subrogation does not arise until the creditor has been fully satisfied.

In addition to this right of subrogation by which the surety is enabled to stand in the creditor's shoes, the surety has also a direct right to sue the principal for reimbursement and the co-sureties for contribution. These rights were first given by equity but for over a century the surety has been allowed to sue at law; *Decker v. Pope*, 1 Selwyn, Nisi Prius 91; *Turner v. Davies*, 2 Esp. 479. The rights have become so well settled that they are frequently spoken of as being based upon a contract implied in fact at the time that the surety binds himself, but like the right of subrogation the better view is that these rights exist independently of contract. *Dempsey v. Bush*, 18 Ohio St. 376 (subrogation); *Hall v. Smith*, 5 How. 96, (reimbursement)—but see *Osborn v. Cunningham*, 4 Dev. & B. 423; *Deering v. Earl of*